IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-628

ROBERT T. MAGILL, *et al.*,

Petitioners,

—v.—

DENNIS M. LYNCH, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit, entered on July 1, 1977, vacating the decision of the United States District Court for the District of Rhode Island and remanding for further proceedings on one limited ground.

CITATIONS TO OPINIONS BELOW

The decision of the United States Court of Appeals for the First Circuit is reported at 560 F.2d 22 and is set forth in the Appendix, infra at pp. 1a-13a. The decision of the United States District Court for the District of Rhode Island is reported at 400 Fed. Supp. 84, and is set forth in the Appendix, infra, at pp. 14a-32a.

JURISDICTION

The judgment of the United States Court of Appeals was entered on July 25, 1977. By order dated September 21, 1977, Mr. Justice Brennan extended the time for filing this Petition to and including November 1, 1977. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

QUESTION PRESENTED

Does a city charter provision which bars a city employee's candidacy in a non-partisan city election, violate the First and Fourteenth Amendments?

STATUTORY PROVISIONS INVOLVED

Pawtucket, Rhode Island Charter, Article VIII, Chapter 1, Sections 8-115(5)(6)(1974):

> (5) No appointed official, employee or member of any board or commission of the city, shall be a member of any national, state or local committee of a political party or organization, or any officer of a partisan political organization, or take part in a political campaign, except his right privately to express his opinion and to cast his vote.
>
> (6) No appointed official or employee of the city and no member of any board or commission shall be a candidate for nomination or election to any political office, whether city, state or federal, except elected members of boards or commissions running for re-election, unless he shall have first resigned his then employment or office.

Pawtucket, Rhode Island Charter, Article VIII, Chapter 2, Section 8-201:

> (1) A violation of any of the prohibitions of Chapter 1 of this Article shall be a misdemeanor punishable by a fine of not more than $300.00 or by imprisonment for not more than ninety days, or both, and if the violator is an officer or employee of the city, by removal from office or immediate dismissal."

STATEMENT OF THE CASE

Petitioners are firemen employed by the City of Pawtucket, Rhode Island, and are residents and voters of Pawtucket. They were candidates for the office of Mayor of Pawtucket and City Councilman, respectively. Under the provisions of the City Charter for the City of Pawtucket, both of those offices are filled by nonpartisan elections. 1/ Article VIII of the City Charter prohibits all city employees from engaging in any political activities "except his right privately to express his opinion and to cast his vote." Among the prohibited activities are taking part in a political campaign and becoming a candidate for election to any political office. Violation of those provisions is a misdemeanor punishable by fine or imprisonment and immediate dismissal from city employment.

1/ Section 6-130 of the City Charter provides:

> There shall be no party or political designation placed upon any voting machine or paper ballot used in any primary election or elections, and all candidates for office in the city, except as herein otherwise specifically provided, shall be deemed to be candidates without party or political designation.

The Petitioners ran unsuccessfully for office in 1975. Prior to the elections, they brought this action under 42 U.S.C. §1983 to enjoin the operation of the provisions in question and prohibit the imposition of any sanctions against them.

On September 15, 1975, following an evidentiary hearing on a motion for a preliminary injunction, the District Court issued its decision holding the charter provisions unconstitutional. 2/ The District Court found there was no compelling city interest, and certainly none that could not be achieved by less restrictive alternatives. The Court observed that the city's interests were less compelling than were the Government's interests in Civil Service Commission v. National Association of Letter Carriers, 413 U.S. 548 (1973), and the state's interest in Broadrick v. Oklahoma, 413 U.S. 601 (1973), both of which involved partisan elections.

The District Court held that the dangers of partisan political activity by city employees disappeared or were "much diminished" when nonpartisan electoral activity was involved.

2/ The preliminary injunction was made final on September 30, 1976.

(App., infra, p. 25a). A candidate in a nonpartisan election is not committed to a "nationwide party platform or philosophy." Ibid. If there are no party nominations, the danger of a "politicized bureaucracy" is greatly diminished. Ibid. It is far less likely that a city employee will try to influence votes improperly in a nonpartisan election. (App., infra, pp. 26a-27a). The District Court further found that the Pawtucket elections were indeed nonpartisan since no party affiliations appear on the ballot, the nominating process is open to anyone, and party support of candidates is not automatic. (App., infra, pp. 29a-31a).

The respondents appealed to the First Circuit, [3] which, relying on Letter Carriers and Broadrick, held that a government may constitutionally prohibit its employees' participation in "nominally nonpartisan elections if political parties play a large role in the campaigns." (App., infra, p. 9a). The First Circuit held that many of the dangers that would arise in a partisan election might also

[3] The First Circuit held that the case is not moot because sanctions might still be imposed against Petitioners if the law is valid. (App., infra, p. 2a).

arise in the type of nonpartisan election involved here. There might be political favoritism to the party that supported a successful candidate, party discipline might create a politicized bureaucracy, and party coercion might still occur. (App., infra, pp. 7a-10a). The First Circuit therefore vacated the judgment of the District Court and remanded the case for consideration of a possible, but limited, overbreadth claim.[4]

REASONS FOR GRANTING THE WRIT

This case presents an opportunity for the Court to resolve an important First Amendment question that was discussed, but not decided, in Letter Carriers and Broadrick. The question is whether city employees can be prohibited from participating in nonpartisan electoral activity. The First Circuit upheld such a restriction, reasoning that a government may place certain limits on campaigning by public employees if the limits substan-

[4] The First Circuit acknowledged that its analysis would almost certainly preclude a successful overbreadth claim on remand, but did not wish, on the record before the court, to foreclose that possibility. (App. infra, pp. 10a-13a). The Court apparently rejected the claim that the provisions were facially overbroad.

tially serve government interests that are important enough to outweigh the employees' First Amendment rights.

Relying upon the interests identified by this Court in Letter Carriers, Broadrick, and United Public Workers v. Mitchell, 330 U.S. 75 (1947), the Circuit Court found that "the government may constitutionally restrict its employee's participation in nominally non-partisan elections if political parties play a large role in the campaigns." (App., infra, p. 9a).

This Court has identified three interests that may be served by laws that restrict electoral activity by public employees: (1) Efficiency: employee faithfulness to the government that employs them rather than to the party that nominated and helped elect them; (2) nonpartisanship: avoiding the danger of creating a powerful political machine which controls the bureaucracy and keeps itself in power by requiring employees to use their offices to influence voters improperly; (3) merit advancement: insuring that government employees achieve advancement based on merit and that "they be free from both coercion and the prospect of favor from political activity" (App., infra, p. 9a).

Those interests are not endangered by permitting city employees to engage in non-partisan political activity.

1. Efficiency. If party nomination is not a prerequisite for running in the election, there is no danger of excessive loyalty to party. Party support would be regarded by the candidate the same as support from unions, civic organizations or other interests, and that type of support has never been deemed a danger to the political process, or a danger to the efficient performance of duties.

2. Nonpartisanship. The possibility of a party machine taking over the bureaucracy is highly unlikely in the context of a non-partisan election. Party nomination is unnecessary and party identification is not permitted.

3. Merit advancement. Political coercion or favoritism of city employees is extremely unlikely in a nonpartisan system. Even the First Circuit agreed: "Political oppression of public employees will be rare in an entirely nonpartisan system." (App., infra, p. 9a). 5/

5/ We would also note that all of these concerns are rendered even more attenuated in
(continued)

The prior decisions of this Court have each stressed the danger of partisan control of the civil service. As this Court emphasized in Mitchell, 330 U.S. at 100, "It is only partisan political activity that is interdicted."

The fundamental distinction between this case and Letter Carriers and Broadrick, is that those cases upheld statutes curtailing public employees' activities in partisan politics. The Hatch Act challenged in Letter Carriers specifically exluded participation in nonpartisan elections from its prohibition of political activity. See 5 U.S.C. §7326. Obviously, Congress had concluded that the extremely remote possibility of improper activities, in a nonpartisan system, did not justify abridgement of First Amendment rights. In addition, the statute in Broadrick had been construed by the state's Attorney General to be limited to regulating the conduct of state employees solely in the area of partisan politics (413 U.S. at 716). In contrast, the provisions of the Pawtucket City Charter

light of this Court's decision in Elrod v. Burns, 427 U.S. 347 (1976), protecting governmental employees against political retribution.

at issue here do, on their face, prohibit nonpartisan as well as partisan political activity.

Petitioners submit that Broadrick and Letter Carriers allow restrictions only on partisan political activity by governmental employees. The facts in Letter Carriers and Broadrick indicate that this Court was addressing only the issue of restrictions on partisan political activity and did not reach the question as to whether such restrictions can constitutionally be placed on nonpartisan political activities. This case squarely raises that question.

The extremely broad construction of the word partisan adopted by the First Circuit renders meaningless the exception Congress carefully made in the Hatch Act for nonpartisan activities, and ignores the distinction between partisan and nonpartisan activities stressed by this Court in prior decisions. Furthermore, because the Pawtucket City Charter, on its face, prohibits all political activity, whether partisan or nonpartisan, it must be declared unconstitutional on its face, regardless of whether political parties play a large or a small role in the election process.

The evidence in this case shows that, although elections for municipal offices in Pawtucket are not completely sterilized from contact with party politics, they are in fact predominately nonpartisan in character. Accordingly, the dangers of partisan political activity by government employees outlined by this Court in Letter Carriers, are greatly diminished and do not justify abridgement of First Amendment rights.

The issue of whether a prohibition against participation in nonpartisan activity is constitutionally permissable is an important issue. The decisions of this Court clearly point to the conclusion that there is a constitutionally protected right to participate in nonpartisan political activities. This Court should grant the writ and so hold.

CONCLUSION

For the reasons set forth above, certiorari should be granted.

Respectfully submitted,

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October 31, 1977

APPENDIX

United States Court of Appeals for the First Circuit

No. 76-1532

ROBERT T. MAGILL, ET AL.,
PLAINTIFFS, APPELLEES,
v.
DENNIS M. LYNCH, ET AL.,
DEFENDANTS, APPELLANTS.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND
[HON. RAYMOND J. PETTINE, *U.S. District Judge*]

Before COFFIN, *Chief Judge*,
MOORE*, and ALDRICH, *Circuit Judges*.

William F. McMahon, with whom *Moses Kando* was on brief, for appellant.
Amato A. DeLuca, with whom *Sheila-Souza* was on brief, for appellees.

July 1, 1977

COFFIN, *Chief Judge*. The plaintiffs in this case are Pawtucket, Rhode Island firemen who ran for city office in 1975. The defendants are city officials who threatened to enforce the city's "Little Hatch Act" against the firemen if they ran. Pawtucket's counterpart to the federal Hatch Act prohibits city employees from engaging in a broad range of political activities. Becoming a candidate for any city office

* Of the Second Circuit, sitting by designation.

is specifically proscribed.[1] Pawtucket's elections are, by charter, held in odd years, and do not utilize party nominating machinery or make reference to party labels in the election itself. The federal district court granted a preliminary injunction ordering the defendants not to penalize the plaintiffs for their campaigns. Plaintiff Healy's pursuit of a city council seat ended with his defeat in the primary. Plaintiff Magill's campaign for mayor survived the primary, only to founder in the general election. Some time later, the district court made its preliminary injunction final.[2] This appeal followed.

The question before us is whether Pawtucket's charter provision, which bars a city employee's candidacy in even

[1] The relevant charter provisions read as follows:

"(5) No appointed official, employee or member of any board or commission of the city, shall be a member of any national, state or local committee of a political party or organization, or an officer of a partisan political organization, or take part in a political campaign, except his right privately to express his opinion and to cast his vote.

(6) No appointed official or employee of the city and no member of any board or commission shall be a candidate for nomination or election to any public office, whether city, state or federal, except elected members of boards or commissions running for re-election, unless he shall have first resigned his then employment or office." Pawtucket, R.I., Charter, art. VIII, ch. 1, § 8-115(5) & (6) (1974).

"(1) A violation of any of the prohibitions of chapter 1 of this article shall be a misdemeanor, punishable by a fine of not more than three hundred dollars or by imprisonment for not more than ninety days, or both, and if the violator is an officer or employee of the city, by removal from office or immediate dismissal." *Id.*, art. VIII, ch. 2, § 8-201.

The charter also bars city employees from holding another public office, *id.*, ch. 1, § 8-102, a prohibition without relevance to these plaintiffs, who lost their election bids. The charter forbids employees to solicit political contributions, *id.*, § 8-115(3), but there is no suggestion that these employees violated this provision, and the district judge did not include it in his discussion of the charter provisions at issue in this case.

[2] Although the plaintiffs lost their election bids while the preliminary injunction was in effect, we do not think this case is moot. The plaintiffs were candidates when they filed their complaint and they ran for office after the injunction was entered. They may still be punished for these activities. Pawtucket, R.I., Charter, art. VIII, ch. 2, § 8-201 (1974). The injunction now in effect prevents the defendants from "imposing upon Plaintiffs any penalties . . . as a result of Plaintiffs' campaigns . . . ." This order, by standing between the plaintiffs and punishment for their candidacies, has a continuing effect and saves the case from mootness. Moreover, the injunction is so worded as to protect the plaintiffs should they again seek public office.

a nonpartisan city election, is constitutional. The issue compels us to extrapolate two recent Supreme Court decisions, *Civil Service Comm'n* v. *Nat'l Ass'n of Letter Carriers*, 413 U.S. 548 (1973) and *Broadrick* v. *Oklahoma*, 413 U.S. 601 (1973). Both dealt with laws barring civil servants from partisan political activity. *Letter Carriers* reaffirmed *United Public Workers* v. *Mitchell*, 330 U.S. 75 (1947), upholding the constitutionality of the Hatch Act as to federal employees. *Broadrick* sustained Oklahoma's "Little Hatch Act" against constitutional attack, limiting its holding to Oklahoma's construction that the Act barred only activity in partisan politics.[3] In *Mancuso* v. *Taft*, 476 F.2d 187, 200 (1st Cir. 1973), we assumed that proscriptions of candidacy in nonpartisan elections would not be constitutional. *Letter Carriers* and *Broadrick* compel new analysis.

The Pawtucket charter, a comprehensive document endorsed by the voters in 1953 and revised in 1966, attempts to make elections for mayor and city council nonpartisan. This intent is expressed by the charter's structuring of the election process. Elections are held in off years, when few state or federal contests are held, to minimize coattail campaigning. Candidates are nominated by petitions that may be signed by any city elector no matter what his party affiliation. The number of nominated candidates is nar-

[3] The federal statute explicitly permits nonpartisan political activity:

"7326. Nonpartisan political activity permitted — Section 7324(a)(2) of this title does not prohibit political activity in connection with —

(1) an election and the preceding campaign if none of the candidates is to be nominated or elected at that election as representing a party any of whose candidates for presidential elector received votes in the last preceding election at which presidential electors were selected; or

(2) a question which is not specifically identified with a National or State political party or political party of a territory or possession of the United States." 5 U.S.C. § 7326.

The Oklahoma statute is not so expressly limited. It prohibits, among other things, soliciting "for any political organization, candidacy or other political purpose" as well as becoming "a candidate for nomination or election to any paid public office." *Broadrick*, 413 U.S. at 604. Nonetheless, the state's Attorney General has interpreted the law as prohibiting only "clearly partisan political activity". *Id.* at 617.

rowed to two for each office by a primary election open to all voters; and the surviving candidates run against each other in the general election. The candidates' party affiliations do not appear on the ballot. In short, so far as the laws of Pawtucket can make them, these elections are nonpartisan.

But institutions exist in their cultural context. And in Pawtucket the context has historically been partisan. The stipulations of the parties and uncontradicted testimony presented by the defendants paint this picture of elections in Pawtucket. The city has two political parties, Democratic and Republican. These parties regularly endorse candidates in the primary and general elections. The endorsements are frequently solicited by candidates at party meetings; and the Democratic endorsement in particular, is highly prized. Plaintiff Magill himself appeared at one Democratic endorsement meeting, where he urged those present to support him, though he did not formally request an endorsement. For the past decade, the chairman of the city's Democratic committee has been the mayor. At the last election he was opposed by the chairman of the city's Republican committee, as well as by plaintiff Magill. Many regular Democratic workers who serve in partisan statewide campaigns also give aid to endorsed Democratic candidates in the city elections. The 1975 campaign illustrates how pervasive is the influence of political parties on city elections. Twelve officials were to be elected in that year: a mayor, three councilmen-at-large, two school committee members, and six councilmen. Originally, thirty candidates were nominated for these posts. Only twelve of the thirty were endorsed by the Democratic committee. All twelve survived the primary, and ten were ultimately elected. Every successful candidate — except one, who was not endorsed by the Democrats — had advertised his endorsement or political affiliation in the city's newspaper.

The district court took note of this ambivalent character of the Pawtucket system. It took as its objective the task of determining whether the system was partisan or not. It also relied on our First Amendment analysis in *Mancuso*, and looked for compelling city interests that could not be served by less restrictive alternatives. It observed that the city's interests were less compelling than were the government's interests in *Letter Carriers* and *Broadrick*, there being less likelihood that adherence to a state or national party platform could influence municipal policy, little danger of creation of a powerful and possibly corrupt political machine, and little prospect of city employees using their office to influence voters. The court stressed the facts that no party label appeared in the ballot, therefore making it more difficult to vote a straight party ticket; that anyone could sign nominating petitions and could vote in the primary elections; and that there was no pattern of automatic party support. It concluded "That elections for municipal offices in Pawtucket, while not completely sterilized from contact with party politics, are in fact substantially non-partisan in character" and that the dangers of partisan political activity are not a compelling justification for the charter restrictions.

Appellees contend that the district court's finding of nonpartisanship must stand unless clearly erroneous. We do not see our standard of review in this light. Of course all of the subsidiary facts are uncontroverted and many are stipulated. The court's characterization of Pawtucket's municipal elections as "substantially non-partisan" also seems to be a fair and supported summary description. But the critical question is whether Pawtucket is constitutionally prohibited from barring city employees from being candidates for mayor and city council in the kind of municipal elections revealed in this record, even though the elections be characterized as nonpartisan.

In *Letter Carriers* and *Broadrick* the statutes involved, either as written or as construed, *see* n. 3 *supra*, proscribed only partisan activities. The Court therefore was not called upon to deal with the constitutionality of efforts to limit or prohibit political activity in elections which could be called nonpartisan, and indeed painstakingly and almost without exception confined its strictures to "partisan" elections.

What we are obligated to do in this case, as the district court recognized, is to apply the Court's interest balancing approach to the kind of nonpartisan election revealed in this record. We believe that the district court found more residual vigor in our opinion in *Mancuso* v. *Taft*, *supra*, than remains after *Letter Carriers*. We have particular reference to our view that political candidacy was a fundamental interest which could be trenched upon only if less restrictive alternatives were not available. 476 F.2d at 196, 198-200. While this approach may still be viable for citizens who are not government employees, the Court in *Letter Carriers* recognized that the government's interest in regulating both the conduct and speech of its employees differs significantly from its interest in regulating those of the citizenry in general. Not only was *United Public Workers* v. *Mitchell*, *supra*, 330 U.S. at 75, "unhesitatingly" reaffirmed, 413 U.S. at 547,[4] but the Court gave little weight to the argument that prohibitions against the coercion of government employees were a less drastic means to the same end, deferring to the judgment of the Congress. *Id.* at 566-567. We cannot be more precise than the Third Circuit in characterizing the Court's approach as "some sort of 'balancing' process", *Alderman* v. *Philadelphia Housing Authority*, 496 F.2d 164, 171 n. 45 (1974). It appears that

[4] One of the points made by the dissent in *Letter Carriers* was the approval apparently accorded by the majority to the "rational basis" standard of *Mitchell*. 413 U.S. at 596-597.

the government may place limits on campaigning by public employees if the limits substantially serve government interests that are "important" enough to outweigh the employees' First Amendment rights. 413 U.S. at 564. Applying this balancing approach, we cannot say that Pawtucket's interests were not sufficiently important. The analysis differs somewhat because the focus is local rather than national.

In *Letter Carriers* the first interest identified by the Court was that of an efficient government, faithful to the Congress rather than to party. The district court discounted this interest, reasoning that candidates in a local election would not likely be committed to a state or national platform. This observation undoubtedly has substance insofar as allegiance to broad policy positions is concerned. But a different kind of possible political intrusion into efficient administration could be thought to threaten municipal government: not into broad policy decisions, but into the particulars of administration — favoritism in minute decisions affecting welfare, tax assessments, municipal contracts and purchasing, hiring, zoning, licensing, and inspections. Just as the Court in *Letter Carriers* identified a second governmental interest in the avoidance of the appearance of "political justice" as to policy, *id.* at 565, so there is an equivalent interest in avoiding the appearance of political preferment in privileges, concessions, and benefits. The appearance (or reality) of favoritism that the charter's authors evidently feared is not exorcised by the nonpartisan character of the formal election process. Where, as here, party support is a key to successful campaigning, and party rivalry is the norm, the city might reasonably fear that politically active bureaucrats would use their official power to help political friends and hurt political foes. This is not to say that the city's interest in visibly fair and effective

administration necessarily justifies a blanket prohibition of all employee campaigning; if parties are not heavily involved in a campaign, the danger of favoritism is less, for neither friend nor foe is as easily identified.

A second major governmental interest identified in *Letter Carriers* was avoiding the danger of a powerful political machine. The Court had in mind the large and growing federal bureaucracy and its partisan potential. The district court felt this was only a minor threat since parties had no control over nominations. But in fact candidates sought party endorsements, and party endorsements proved to be highly effective both in determining who would emerge from the primary election and who would be elected in the final election. Under the prevailing customs, known party affiliation and support were highly significant factors in Pawtucket elections. The charter's authors might reasonably have feared that a politically active public work force would give the incumbent party, and the incumbent workers, an unbreakable grasp on the reins of power. In municipal elections especially, the small size of the electorate and the limited powers of local government may inhibit the growth of interest groups powerful enough to outbalance the weight of a partisan work force. Even when nonpartisan issues and candidacies are at stake, isolated government employees may seek to influence voters or their co-workers improperly; but a more real danger is that a central party structure will mass the scattered powers of government workers behind a single party platform or slate. Occasional misuse of the public trust to pursue private political ends is tolerable, especially because the political views of individual employees may balance each other out. But party discipline eliminates this diversity and tends to make abuse systematic. Instead of a handful of employees pressured into advancing their immediate superior's political ambitions,

the entire government work force may be expected to turn out for many candidates in every election. In Pawtucket, where parties are a continuing presence in political campaigns, a carefully orchestrated use of city employees in support of the incumbent party's candidates is possible. The danger is scarcely lessened by the openness of Pawtucket's nominating procedure or the lack of party labels on its ballots.

The third area of proper governmental interest in *Letter Carriers* was ensuring that employees achieve advancement on their merits and that they be free from both coercion and the prospect of favor from political activity. The district court did not address this factor, but looked only to the possibility of a civil servant using his position to influence voters, and held this to be no more of a threat than in the most nonpartisan of elections. But we think that the possibility of coercion of employees by superiors remains as strong a factor in municipal elections as it was in *Letter Carriers*. Once again, it is the systematic and coordinated exploitation of public servants for political ends that a legislature is most likely to see as the primary threat of employees' rights. Political oppression of public employees will be rare in an entirely nonpartisan system. Some superiors may be inclined to ride herd on the politics of their employees even in a nonpartisan context, but without party officials looking over their shoulders most supervisors will prefer to let employees go their own ways.

In short, the government may constitutionally restrict its employees' participation in nominally nonpartisan elections if political parties play a large role in the campaigns.[5]

[5] We realize that this will not always be an easy line to draw. As we recognized in *Mancuso* v. *Taft*, *supra*, 476 F.2d at 200, "the line between nonpartisan and partisan can often be blurred by systems whose true characters are disguised by the names given them by their architects". But we do not think any brighter line would do justice to both government and employees. The interests identified by the *Letter Carriers* Court drive us past

In the absence of substantial party involvement, on the other hand, the interests identified by the *Letter Carriers* Court lose much of their force. While the employees' First Amendment rights would normally outbalance these diminished interests, we do not suggest that they would always do so. Even when parties are absent, many employee campaigns might be thought to endanger at least one strong public interest, an interest that looms larger in the context of municipal elections than it does in the national elections considered in *Letter Carriers*. The city could reasonably fear the prospect of a subordinate running directly against his superior or running for a position that confers great power over his superior. An employee of a federal agency who seeks a Congressional seat poses less of a direct challenge to the command and discipline of his agency than a fireman or policeman who runs for mayor or city council. The possibilities of internal discussion, cliques, and political bargaining, should an employee gather substantial political support, are considerable. *Cf. Pickering* v. *Board of Education*, 391 U.S. 563, 570 (1968); *Hobbs* v. *Thompson*, 448 F.2d 456, 470 (5th Cir. 1971).

This brings us to the question the district court did not have to decide — whether the charter provisions are overbroad. A well-known exception to the rule that litigants may attack a statute only as it applies to them, the doctrine of overbreadth allows one whose acts may constitutionally be regulated to attack the regulation on the ground that it unconstitutionally regulates others. *See generally*, Note,

the stopping place chosen by the district court. The convenience of the judiciary is not a sufficient reason for restricting otherwise protected conduct or for narrowing the scope of an otherwise constitutional law. We are not convinced in any event that much certainty would be gained if we relied exclusively on how the city labels its elections. In other cities, partisan and nonpartisan elements will surely be more ambiguously mixed; and in some places, certain offices may be exempted by tradition from party struggle even though party designations are allowed on the ballot.

The First Amendment Overbreadth Doctrine, 83 Harv. L. Rev. 844 (1970). Overbreadth analysis is ordinarily invoked when a statute touches on significant First Amendment concerns. *Id.* The doctrine stems from a judicial fear that invalid laws will too often deter protected speech if they are not quickly struck down. Candidacy is a First Amendment freedom. *Mancuso* v. *Taft*, *supra*, 476 F.2d at 195-197. Pawtucket bans both partisan and nonpartisan candidacies in no uncertain terms; it forbids its employees to run for "any public office, whether city, state or federal". Pawtucket, R.I., Charter, art. VIII, ch. 1, § 8-115(6).[8] This provision is therefore open to overbreadth attack.

The governing case is *Broadrick*, which introduced the doctrine of "substantial" overbreadth in a closely analogous case. Under *Broadrick*, when one who challenges a law has engaged in constitutionally unprotected conduct (rather than unprotected speech) and when the challenged law is aimed at unprotected conduct, "the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." 413 U.S. at 615. Two major uncertainties attend the doctrine:

[8] A separate provision tells city employees not to "take part in a political campaign". Pawtucket, R.I., Charter, art. VIII, ch. 1, § 8-115(5). In the light of the more specific prohibition of candidacy, *id.* § 8-115(6), we doubt that this provision was meant to cover candidates. *See Mancuso* v. *Taft*, *supra*, 476 F. 2d at 189 n. 1. Moreover, a state court could authoritatively construe "political" to mean "partisan", eliminating with one stroke any overbreadth problem. On the day it issued its opinions in *Broadrick* and *Letter Carriers*, the Supreme Court summarily affirmed a decision that used this reasoning to turn back an overbreadth attack in a case that is indistinguishable from this one. *Elder* v. *Rampton*, 413 U.S. 902 (1973), *affirming* 360 F. Supp. 559 (D. Utah 1972) (three-judge court) (statute proscribing "political" activity could be construed to bar only partisan activity). *See Mining* v. *Wheeler*, 378 F. Supp. 1115 (W.D. Mo. 1974). *See also* n. 3 *supra*. We cannot rule on the constitutionality of this provision in the absence of a clarifying state court interpretation of its reach. In *Elder*, the district court apparently rendered a final judgment against the employees because of the open question of state law. 360 F. Supp. at 565. The better course might well be to stay the proceeding while retaining jurisdiction, or to certify the controlling question of state law. *See, e.g., Harrison* v. *NAACP*, 360 U.S. 167, 179 (1959). We must remand the case in any event, and we leave this question to the district court.

how to distinguish speech from conduct, and how to define "substantial" overbreadth. We are spared the first inquiry by *Broadrick* itself. The plaintiffs in that case had solicited support for a candidate, and they were subject to discipline under a law proscribing a wide range of activities, including soliciting contributions for political candidates and becoming a candidate. The Court found that this combination required a substantial overbreadth approach. The facts of this case are so similar that we may reach the same result without worrying unduly about the sometimes opaque distinction between speech and conduct.

The second difficulty is not so easily disposed of. *Broadrick* found no substantial overbreadth in a statute restricting partisan campaigning. Pawtucket has gone further, banning participation in nonpartisan campaigns as well. Measuring the substantiality of a statute's overbreadth apparently requires, *inter alia*, a rough balancing of the number of valid applications compared to the number of potentially invalid applications. *Cf. The Supreme Court — 1972 Term*, 87 Harv. L. Rev. 1, 150-152 (1973). Some sensitivity to reality is needed; an invalid application that is far-fetched does not deserve as much weight as one that is probable. The question is a matter of degree; it will never be possible to say that a ratio of one invalid to nine valid applications makes a law substantially overbroad. Still, an overbreadth challenger has a duty to provide the court with some idea of the number of potentially invalid applications the statute permits. Often, simply reading the statute in the light of common experience or litigated cases will suggest a number of probable invalid applications. *See, e.g., Gooding* v. *Wilson*, 405 U.S. 518 (1972). But this case is different. Whether the statute is overbroad depends in large part on the number of elections that are insulated from party rivalry yet closed to Pawtucket employees.

For all the record shows, every one of the city, state, or federal elections in Pawtucket is actively contested by political parties. Certainly the record suggests that parties play a major role even in campaigns that often are entirely nonpartisan in other cities. School committee candidates, for example, are endorsed by the local Democratic committee.

The state of the record does not permit us to find overbreadth; indeed such a step is not to be taken lightly, much less to be taken in the dark. On the other hand, the entire focus below, in the short period before the election was held, was on the constitutionality of the statute as applied. Plaintiffs may very well feel that further efforts are not justified, but they should be afforded the opportunity to demonstrate that the charter forecloses access to a significant number of offices, the candidacy for which by municipal employees would not pose the possible threats to government efficiency and integrity which *Letter Carriers*, as we have interpreted it, deems significant. Accordingly, we remand for consideration of plaintiffs' overbreadth claim.

The judgment is vacated and the cause remanded to the district court for further proceedings in accordance with this opinion.

OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF RHODE ISLAND

District Court of the United States
For The District of Rhode Island

ROBERT T. MAGILL, et al.,)
)
v.) Civil Action
) No. 75-0267
DENNIS M. LYNCH, et al.,)

O P I N I O N

September 15, 1975

PETTINE, Chief Judge. The issue presented by this action is whether municipal employees can constitutionally be prohibited from running for non-partisan elective offices in the city by which they are employed. Plaintiffs Robert T. Magill and Martin Healy are firemen employed by the City of Pawtucket, Rhode Island, and, as residents and voters of Pawtucket, they are candidates for the offices of Mayor of Pawtucket and City Councilman, respectively. Under the provisions of the City Charter for the City of Pawtucket, both of these offices are filled by non-partisan elections. 1/ Article VIII of the City Charter, however, prohibits city employees from

1/ Section 6-130 of the City Charter provides: "There shall be no party or political d designation placed upon any voting machine or paper ballot used in any primary election or election, and all candidates for office in the city, except as herein otherwise specifically provided, shall be deemed to be candidates without party or political designation."

engaging in any political activities, "except his right privately to express his opinion and to cast his vote." Among the prohibited activities are taking part in a political campaign and becoming a candidate for election to any public office.2 / Violation of these provisions can lead to a fine or imprisonment and immediate dismissal from city employment.3 / Plaintiffs

2/ Section 8-115 of the City Charter provides in pertinent part:

"(5) No appointed official, employee or member of any board or commission of the city, shall be a member of any national, state or local committee of a political party or organization, or an officer of a partisan political organization, or take part in a political campaign, except his right privately to express his opinion and to cast his vote.

"(6) No appointed official or employee of the city and no member of any board or commission shall be a candidate for nomination or election to any public office, whether city, state or federal, except elected members of boards or commissions running for re-election, unless he shall have first resigned his then employment or office."

3/ Section 8-201 of the City Charter provides in part:

"(1) A violation of any of the prohibitions of chapter 1 of this article shall be a misdemeanor, punishable by a fine of not more than three hundred dollars or by imprisonment for not more than ninety days, or both, and if the violator is an officer or employee of the city, by removal from office or immediate dismissal...."

are seeking a declaration that these provisions of the Pawtucket City Charter violate the First and Fourteenth Amendments to the United States Constitution and an injunction prohibiting the defendants, all officials of the City of Pawtucket, from enforcing these provisions. This suit is based on 42 U.S.C. § 1983, and jurisdiction is based on 28 U.S.C. § 1343. 4/ The matter is presently before the Court on plaintiffs' motion for preliminary injunction.

In 1972, this Court had occasion to review a "little Hatch Act" similar to the one challenged here in Mancuso v. Taft, 341 F.Supp. 574 (D.R.I. 1972). In that case, this Court upheld the claim of the plaintiff, a city employee who wanted to run for office in a partisan election, that the challenged provisions of the Cranston, Rhode Island, City Charter were unconstitutionally overbroad. One of the grounds for that conclusion was that the re-- trictions on political activity placed upon city employees by the City Charter were not

4/ At the outset, defendants' argument that plaintiffs should have appealed their case to the State Board of Elections before bringing this suit should be noted. It is well settled in this Circuit, however, that there is no automatice requirement of exhaustion of administrative remedies in § 1983 cases so long as the case is ripe for decision. Raper v. Lucey, 488 F.2d 748, 751 (1st Cir. 1973). Here there are no facts in dispute, and the local authorities' construction of the challenged Charter provisions is clear. This case is ripe for adjudication, and requiring plaintiffs to pursue state remedies would serve no purpose. Cf. Potter v. McQueeney, 338 F.Supp. 1133, (D. R.I. 1972); Ricciotti v. Warwick School Comm., 319 F.Supp. 1006 (D.R.I. 1970).

confined to partisan activities but were applicable to non-partisan political activity as well. The case was subsequently affirmed by the Court of Appeals for the First Circuit. Mancuso v. Taft, 476 F.2d 187 (1st Cir. 1973). Shortly thereafter, however, the continuing vitality of the Mancuso case was called into question as a result of the Supreme Court's decision in U.S. Civil Service Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548 (1973) (hereinafter Letter Carriers), and Broadrick v. Oklahoma, 413 U.S. 601 (1973). Those decisions, reaffirming the earlier case of United Public Workers of Am. v. Mitchell, 330 U.S. 75 (1947), held that the federal Hatch Act, which limited the political activities of federal civil service employees, and Oklahoma's "little Hatch Act" did not violate the First Amendment.

The defendants contend that the legal issues presented in this case are completely controlled by Letter Carriers and Broadrick and that the plaintiffs' challenge to the Pawtucket City Charter provisions must therefore fail. This Court, of course, is duty-bound to respect and follow the teachings of the Supreme Court and acknowledges the importance and preeminence of the Letter Carriers and Broadrick decisions in the area of Hatch Act-type cases, such as the one presently before this Court. Nevertheless, after careful study and consideration, I must conclude that these two recent Supreme Court decisions do not address the precise circumstances present here and thus do not preclude further inquiry into the constitutionality of the challenged Charter provisions. First, as I will discuss shortly, the factual basis of this case differs from those in Letter Carriers and Broadrick, so a similar outcome is not mandated in a strict stare decisis sense. Second, and more importantly, these differences in the factual bases are sufficiently signifi-

cant to justify a different result even when examining and applying the same policy considerations the Supreme Court outlined in its two cases.

The key distinction between the case at bar and the Letter Carriers and Broadrick decisions is that the two latter cases upheld statutes curtailing public employees' political activities only in the context of partisan politics. The Hatch Act, challenged in Letter Carriers, specifically excludes participation in non-partisan elections from its prohibition of political activity. 5/ Simil-

5/ 5 U.S.C.A. §7326:
"§ 7326. Nonpartisan political activity permitted. Section 7324(e)(2) of this title does not prohibit political activity in connection with --
(1) an election and the preceding campaign if none of the candidates is to be nominated or elected at that election as representing a party any of whose candidates for presidential elector received votes in the last preceding election at which presidential electors were selected; or
(2) a question which is not specifically identified with a National or State political party of a territory or possession of the United States.
For the purpose of this section, questions relating to constitutional amendments, referendums, approval of municipal ordinances, and others of a similar character, are deemed not specifically identified with a National or State political party or a political party of a territory or possession of the United States. Pub.L. 89-554, Sept. 6, 1966, 80 State. 526."

arly, the Oklahoma statute challenged in Broadrick, although not explicitly exempting non-partisan political activity, had been construed by appropriate state authorities, and was therefore deemed by the Supreme Court, to be limited to regulating the conduct of state employees solely in the area of partisan politics. 413 U.S. at 617. In contrast, the provisions of the Pawtucket City Charter challenged here not only appear on their face to prohibit non-partisan as well as partisan political activity, but are actually being applied against non-partisan political activity in this very case.

The defendants contend that this distinction between limitations on partisan and non-partisan political activity is not a significant one. Counsel for the defendants asserted with great vigor in oral argument that the Supreme Court's language in Letter Carriers and Broadrick was intended by the Court to go beyond the immediate facts of those two cases and apply to limitations on participation in non-partisan as well as partisan elections. In particular, counsel for the defendants cited the following passage from the Letter Carriers case, emphasizing the significance of the absence of the word "partisan" before the words "an elective public office":

> "So would [an Act of Congress be valid] if, in plain and understandable language, the statute forbade activities such as organizing a political party or club; actively participating in fund-raising activities for a partisan candidate or political party; becoming a partisan candidate for, or campaigning for, an elective public office; actively managing the campaign of a partisan candidate

for public office...."
413 U.S. at 556 (emphasis is added in Defendants' Memorandum in Opposition to Motion for Preliminary Injunction at 3).

Defendants' contention is that the above-noted absence of the word "partisan" indicates that the Supreme Court was affirmatively asserting that a statute prohibiting a public employee's campaigning for any elective public office, partisan or non-partisan, would be upheld.

An equally plausible reading of this passage, however, could focus on the presence of the word "partisan" elsewhere. Thus, while the Court was clearly stating that fund-raising activities for a partisan candidate could constitutionally be prohibited, for example, it was remaining silent on the question of fund-raising for a non-partisan candidate, or perhaps even indicating that such activities could not be prohibited. This is the position recently taken by the Court of Appeals for the Third Circuit:

> "We think, however, that Broadrick and Letter Carriers, properly viewed, carve out carefully circumscribed exceptions to the sweeping injunction of the First Amendment, exceptions allowing a legisture...to inhibit only 'partisan political activity'...."
> Alderman v. Philadelphia Housing Auth., 496 F.2d 164 (3d Cir. 1974) (emphasis in the original).

It is clear that the passage cited by the defendants can be properly interpreted only in the context of the case as a whole, and the facts underlying Letter Carriers and Broadrick indicate that the Court was addressing only

the issue of restrictions on partisan political activities and was not reaching the question, one way or the other, as to whether such restrictions can constitutionally be placed on non-partisan political activities.

Had the Court intended to rule on the issue of non-partisan political activity in Letter Carriers or Broadrick, it probably would have done so explicitly and not through a seemingly fortuitous addition or deletion of a word. This contention is supported by the fact that the partisan/non-partisan distinction in this context is an important one of long standing. As noted earlier, Congress itself made the distinction in the Hatch Act,6/ and the Supreme Court recognized the policy grounds for this distinction as long ago as 1947:

> "Modern American politics involves organized political parties. Many classifications of Government employees have been accustomed to work in politics -- national, state and local -- as a matter of principle or to assure their tenure. Congress may reasonably desire to limit party activity of federal employees so as to avoid a tendency toward a one-party system.... It is only partisan political activity that is interdicted."
> United Public Workers v. Mitchell, supra, 330 U.S. at 100.

After Mitchell, numerous other courts, including this one, found the partisan/non-partisan distinction pivotal in resolving

6/ See note 5 supra.

disputes under "little Hatch Acts" and analogous provisions. See, e.g., Alderman v. Philadelphia Housing Auth., supra, 496 F.2d at 172; Elder v. Rampton, 360 F.Supp. 559, 563-64 n. 7 (D. Utah 1972) (three-judge court, per curiam), aff'd, 93 S.Ct. 3062; Mancuso v. Taft, supra, 341 F.Supp. at 582, and 476 F.2d at 200; Gray v. City of Toledo, 323 F.Supp. 1281, 1287 (N.D. Ohio 1971); Fort v. Civil Service Comm'n of County of Alameda, 392 P.2d 385, 388, 38 Cal.Rptr. 625 (1964). It is true that several of these decisions have been drained of some vitality by Letter Carriers and Broadrick, but to the extent this is so, it is only because they relied on the overbreadth doctrine to provide standing to public employees engaged in partisan political activities to raise challenges to the particular acts or charters in question on the grounds that they also prohibited non-partisan political activity. In Letter Carriers and Broadrick, the Supreme Court rejected this application of the overbreadth doctrine, but the Court by no means indicated that, had standing to challenge the restrictions on non-partisan politics been established, such restrictions would have been upheld.

This case, then, appears to be the first in which a "little Hatch Act" has been challenged not only as facially unconstitutional but also as unconstitutional as applied, thereby obviating recourse to the overbreadth doctrine in order to reach the issue of restrictions on the non-partisan political activities of public employees. Before reaching the merits of the plaintiffs' claim, however, it may be useful to note briefly the key elements of the dilemma posed by government efforts to curtail the political activities of its employees. The dilemma, which was well stated in an official British report over a

quarter-century ago, is still with us:

> "(i) In a democratic society it is desirable for all citizens to have a voice in the affairs of the State and for as many as possible to play an active part in public life.
>
> "(ii) The public interest demands the maintenance of political impartiality in the Civil Service and a confidence in that impartiality as an essential part of the structure of Government...." Report on the Political Activities of Civil Servants, 12 Reports from the Commissioners, Inspectors and Others 717, paragraph 37 (1949), quoted in Esman, The Hatch Act-A Reappraisal, 60 Yale L.J. 986, 987 (1951).

In this country, of course, our political freedoms are enshrined in the First Amendment of the Bill of Rights, and they may be curtailed only for the most compelling of state reasons.

In Mancusco v. Taft, supra, this Court resolved this dilemma in favor of the polical rights of public employees:

> "Involved in the present litigation are the First Amendment rights of government employees to freedom of expression, freedom of association, and freedom to petition the government for redress of grievances. '[S]peech concerning public affairs is more than self-expression; it is the essence of self-government.' Garrison v. Louisiana, 379 U.S. 64, 74-75, 85 S.Ct. 209, 216, 13 L.Ed.2d 125 (1964). Much as the right to vote is a fundamental right, protected because it is the citizen's access to partici-

> pation in the political processes of his State's legislative bodies, Reynolds v. Sims, 377 U.S. 533, 84 F.Ct. 1362, 12 L.Ed.2d 506 (1964), and thus the means for preservation of all other rights, the right to run for public office and engage in political activity would similarly seem to warrant protection." 341 F.Supp. at 581.

The Supreme Court, of course, reached an opposite conclusion regarding government regulation of the partisan political activities of its employees in Letter Carriers and Broadrick, supra. As noted above, however, the question of the regulation of non-partisan political activities of government employees was left open. The issue now before this Court, then, is whether or not the legal reasoning and polity considerations applied by the Supreme Court to the question of partisan political activities in Letter Carriers and Broadrick apply with equal strength to the case of non-partisan political activities.

The restrictions on the partisan political activities of federal employees provided by the Hatch Act, according to the Supreme Court in Letter Carriers, are justified by "the judgment of history,"

> "...that it is in the best interest of the country, indeed essential, that federal service should depend upon meritorious performance rather than political service, and that the political influence of federal employees on others and on the electoral process should be limited."
> 413 U.S. at 557.

The Court then cited several ways in which the uncontrolled partisan activities of

government employees could undermine the merit system and the efficient operation of government or disrupt the political process. 7/ Chief among them were the dangers of partisan policy making by civil servants, 413 U.S. at 565; of government inefficiency resulting from distrust or disloyalty within the bureaucracy, id. at 557; of decreasing public respect for government if the bureaucracy even appeared biased, id. at 565; of a politicized bureaucracy becoming a powerful political machine, id.; of the political independence of members of the bureaucracy being threatened by other members of a politicized bureaucracy, id. at 566; and of civil servants using the powers or prestige of their office to influence voters improperly, id. at 558.

In the context of non-partisan political activity, however, several of these dangers disappear and others appear much diminished. In the case of partisan policy making, for example, a civil servant participating in a non-partisan campaign is not committed to a state-or nationwide party platform or philosophy which concerns all areas of political life, and not simply the issues raised in a single campaign, and which could influence his decisions on the job. Similarly the danger of a political machine developing out of politicized bureaucracy is greatly diminished in non-

7/ For a discussion of these factors, see Note, The Supreme Court, 1972 Term, 87 Harv. L.Rev. 55, 147-48 and n. 34 (1973). See also Esman, The Hatch Act-A Reappraisal, 60 Yale L.J. 986, 987, 991 (1951); Nelson, Public Employees and the Right to Engage in Political Activity, 9 Vand.L.Rev. 27, 42-44 (1957).

partisan elections such as the one presented in this case, where the nomination process is taken away from political parties and conducted in open primaries in which candidates run without party identification and independent of candidates running for other offices in the same election. Furthermore, any tendency for such a trend to develop would be stunted by the small number of elections in this country that are non-partisan. After all, the policy behind the Hatch Act's restrictions solely on partisan political activities

> "reflects the realities of American party politics where for the most part local party units are the cells of state and even of national party organizations. As a candidate or active worker in local partisan campaigns, a Federal employee would be hard-pressed not to identify himself with the state and national organization if his party, ...especially in states operating under the party plan where local office seekers must pledge themselves to support the whole party ticket, including candidates for state and national office." Esman, The Hatch Act-A Reappraisal, 60 Yale L.J. 986, 999-1000 (1951). See also United Public Workers v. Mitchell, supra, 330 U.S. at 100 quoted supra at 10.

It is true that several of the dangers of partisan political activity discussed by the Supreme Court are also present in a non-partisan context. In a non-partisan election, however, such dangers are greatly reduced in scale. For example, it may still be possible for a civil servant to use the prestige of his or her office to influence voters improperly, but here the influence is for individual candidates, not for a complete slate of candidates and the broad political philosophy of a political party, as such influence might be used in a partisan campaign.

Although the Supreme Court in Letter Carriers and Broadrick did not specify the precise contours of the standard of review it was applying, the Court clearly acknowledged that Hatch Act-type statutes regulate "political expression which if engaged in by private persons would plainly be protected by the First and Fourteenth Amendments." Broadrick, supra at 616. A wealth of Supreme Court decisions makes clear that legislation which burdens First Amendment rights can only be upheld if the state interests it furthers are found to be compelling. See, e.g., United States v. Robel, 389 U.S. 258 (1967); Reynolds v. Sims, 377 U.S. 533 (1964). See also Reilly v. Noel, 384 F.Supp. 741, 748 (D.R.I. 1974) and cases cited therein. Cf. Bullock v. Carter, 405 U.S. 134 (1972). In finding the government interests furthered by the Hatch Act sufficient to sustain the Act's constitutionality in Letter Carriers, the Supreme Court was considering all of the above dangers of political activity by government employees present to a significant degree in a partisan context. Since some of those dangers appear to be absent in a non-partisan context, and since those that are present appear to be less destructive of good government and the political process, the state's interest in grossly limiting the activity of its employees in such cases is accordingly diminished and is therefore something less than compelling.

This Court recognizes that there may be instances where the state's interest in curtailing even the non-partisan political activities of its employees may be compelling.

Nevertheless, as the Supreme Court held in United States v. Robel, supra, 389 U.S. at 267-68, a regulation is invalid when there are "less drastic means" by which a statute restricting First Amendment rights could achieve its legitimate goal. See also Reilly, supra, at 748. Thus, while a municipality could conceivably argue that it had a compelling interest in limiting even the non-partisan political activities of the Chief of its Fire Department, or in requiring its employees to take a leave of absence before running for even a non-partisan office, a broadly worded provision like the one presently before this Court, which applies to the rookie fireman as well as to the Chief, and which requires resignation, rather than a leave of absence, would clearly not constitute less drastic means. 8/

The defendants argue that, even if a distinction between partisan and non-partisan political activity, such as the one made by this Court, is valid, it would not be determinative in this case because, they maintain, there is no such thing as a non-partisan election; that running for even a non-partisan office is inherently partisan. Defendants also contend, and have presented testimony to the effect, that whether or not in the abstract there can be non-partisan elections, the particular elections in the City of Pawtucket that are in issue here are not in fact non-partisan. I must reject both of these contentions.

The defendants' first argument, that all elections are inherently partisan, simply

8/ For a more extensive discussion of less drastic means in a similar context, see the First Circuit's opinion in Mancuso v. Taft, supra, 476 F.2d at 198-200.

means that in all elections the electorate takes sides and that each of the differing factions has its own, perhaps militant, supporters. But this is to ignore the more technical application of the word as it is used by Congress in the Hatch Act, by the Supreme Court in Letter Carriers and Broadrick, and by this Court herein, that is, to mean "related to" political parties. If Congress were using the word partisan as defendants conceive it, the exception Congress made in the Hatch Act for non-partisan elections would be meaningless.

The defendants' second argument is less easily disposed of. They argue that, while the voting process itself is non-partisan because candidates are not identified on the ballot according to party, the campaigns preceding elections in the City of Pawtucket factually are invariably partisan in nature. In support of this contention defendants presented testimony that the Pawtucket Democratic and Republican parties regularly endorse and campaign on behalf of candidates in city elections; that almost all candidates for public office in Pawtucket seek those endorsements, and that most city council members and at least one past Mayor served on city or ward committees of the Democratic or Republican parties while holding, and presumably running for, public offices designated by the Pawtucket City Charter as being filled through non-partisan elections.

In spite of this evidence, I must conclude that the elections for Mayor and City Council in Pawtucket are non-partisan in more than just name only. Since candidates' party affiliationsm if any, do not appear on the ballot, voters who have not been following the campaign closely may not be aware of such affiliations

and thus cannot cast their votes on that basis. Similarly, it is much more difficult to vote a straight party ticket, and in fact one witness for the defendants indicated that one of the purposes the City had in adopting the provision was to reduce the likelihood of weak candidates being swept into office on the "coattails" of stronger candidates of the same party. But it is not only in the voting booth that Pawtucket elections take on their non-partisan character. Nomination petitions can be signed by anyone, regardless of party affiliation. The candidates for a given office are nominated in an open primary election in which voters of any party can vote. Pawtucket City Charter, § 6-110, 115. For example, in the election for Mayor, only the two candidates who receive the greatest number of votes are placed in the final election. Id. § 6-123. Thus unlike a partisan election, where each of the major political parties typically nominates and is officially represented by a candidate in the final election, the non-partisan nomination procedures in Pawtucket can result in a situation where, even though sub rosa, in the final election there are two candidates unofficially representing one of the major political parties and no candidate representing the other. 9/ Finally, there is

9/ As a result of a recent decision by a three-judge panel in this Court holding Rhode Island's election law unconstitutional, Yale v. Curvin, 345 F.Supp. 447 (D.R.I. 1972), it is currently possible for voters throughout the state to sign nomination petitions for candidates of either party and to vote in the primary elections of either party. This condition is probably only temporary, as there was testimony that several bills to replace the Act declared unconstitutional are now pending before the Rhode Island General Assembly. In any case, in partisan elections each party is still able to nominate its own candidate.

no pattern of automatic party support for candidates for office, regardless of their unofficial party affiliations.

It appears then that elections for municipal offices in Pawtucket, while not completely sterilized from contact with party politics, are in fact substantially non-partisan in character. There is no doubt that political parties play a smaller role in these elections, particularly in the nomination process, than they usually do in typically partisan elections. In view of this reduced role for political parties, the dangers of partisan political activity by government employees outlined by the Supreme Court in Letter Carriers are correspondingly diminished and not compelling.

As this Court has frequently stated, the four factors to consider on a request for interim injunctive relief are irreparability of injury to the plaintiffs, a balancing of the injury, the probability of plaintiffs' success on the merits, and preservation of the status quo. See, e.g., Dempsey v. McQueeney, 387 F. Supp. 333 (D.R.I. 1975); Palmigiano v. Travisono, 317 F.Supp. 776 (D.R.I. 1970). As to the first and last factors, it must be observed that absent an injunction, at 5:00 p.m. on September 17, 1975, plaintiffs will have to choose between candidacy for public office on the one hand or the criminal and civil sanctions of the Pawtucket City Charter on the other. Furthermore, the foregoing resolution of the question of the likelihood of success on the merits in plaintiffs' favor itself required a balancing of plaintiffs' First Amendment interests as against the City's interests in keeping its employees out of the electoral process, and this factor as well must be resolved in plaintiffs' favor. The Court therefore concludes that the criteria

for the issuance of a preliminary injunction have been satisfied.

Plaintiffs shall prepare an order accordingly.

[Raymond J. Pettine]

Chief Judge

September 15, 1975.